IN THE IOWA DISTRICT COURT FOR DES MOINES COUNTY

COORDINATED ESTATE SERVICES, INC. D/B/A: OTIS CAMPBELL'S BAR & GRILL/AUNT BEA'S CAFE, **Petitioner,** **vs.** **IOWA DEPARTMENT OF COMMERCE, ALCOHOLIC BEVERAGES DIVISION, STATE OF IOWA,** **Respondent.**	**NO. CVEQ008591** **RULING AND JUDGMENT ON PETITION FOR JUDICIAL REVIEW**

The Petitioner filed its Petition for Judicial Review on April 17, 2009. Said Petition came on for final hearing on November 17, 2009. The Petitioner was represented at the hearing by its attorneys Darwin Bunger and George Eichhorn. The Respondent was represented at the hearing by Assistant Attorney Generals Jeffrey Thompson and John Lundquist. The Court received as evidence the administrative record and heard the arguments of counsel at that time. The matter was deemed submitted as of that date.

COURSE OF PROCEEDINGS

The Petitioner (hereinafter "the Bar") operates a restaurant and bar known as Otis Campbell's Bar & Grill and Aunt Bea's Café in West Burlington, Iowa. This business was granted a liquor license by the Respondent Alcoholic Beverages Division of the Department of Commerce (hereinafter "the Agency") in approximately 1993 or 1994. On July 14, 2008, the Iowa Department of Public Health (hereinafter "IDPH") sent the Bar a first notice of potential violation, relating to an alleged violation of the

Smokefree Air Act. On July 24, 2008, IDPH sent the Bar a second notice of potential violation of the Iowa Smokefree Air Act. A third notice of violation of the Iowa Smokefree Air Act was issued by IDPH to the Bar on August 20, 2008.

The Iowa Department of Public Safety (hereinafter "DPS") filed an administrative hearing compliant against the Bar with the Agency alleging that certain acts of the Bar violated the terms and conditions of the liquor license issued to the Bar. The complaint asserted that the Bar violated Iowa Code Section 123.30(2) and 185 Iowa Administrative Code Section 4.2(1), justifying suspension and/or revocation of the liquor license pursuant to Iowa Code Chapter 123. A hearing was held before an Administrative Law Judge on the complaint on October 31, 2008. The ALJ entered her proposed decision on January 2, 2009. In her decision, the ALJ concluded that the Bar had violated Iowa Code Section 123.30(2) and 185 IAC 4.2(1). She proposed a thirty-day suspension of the Bar's liquor license.

The Bar filed an appeal of the ALJ's decision and requested further review by the Agency Administrator on January 26, 2009. The Administrator agreed on January 26, 2009, to grant the request for further review. The Administrator entered his final order on April 8, 2009. This action constituted final agency action. The Administrator adopted the findings of fact and conclusions of law of the ALJ. The only modification of the ALJ's order was that the Administrator revoked the Bar's liquor license with a provision that the owner of the Bar not hold a liquor license for a period of two years and that the premises covered by the revocation would not be granted a liquor license for a period of one year. In addition, any other liquor licenses held by the licensee in Iowa would be similarly forfeited.

Prior to filing its Application for Judicial Review, the Bar filed an application to stay the Agency's action on April 8, 2009, and also filed an application for a stay in District Court on April 15, 2009. The Bar filed its Petition for Judicial Review in the District Court on April 17, 2009. On that same date, the Administrator granted a conditional stay of the revocation of the liquor license.

A briefing schedule was issued in the judicial review action. Pursuant to prior court order, the matter was scheduled for final hearing and submission on November 17, 2009. As long as the Bar complied with certain conditions of the conditional stay, revocation of the liquor license was stayed pending conclusion of the judicial review action.

STATEMENT OF ISSUES

In its Petition the Bar raises eight grounds challenging the Agency's action. In its brief and argument at the hearing, the Bar reduced its claims down to two general ones. First in general, the Bar asserts that the Agency does not have the authority to enforce the Iowa Smokefree Air Act (hereinafter "ISFAA"). Secondly, the Bar asserts that because the ISFAA is unconstitutional any alleged violation of it cannot be grounds to sanction its liquor license. The Bar makes various constitutional claims. Those include claims that the ISFAA violates (1) the equal protection clauses of the United States and Iowa Constitutions; (2) the privileges and immunities clause of the United States and Iowa Constitutions; (3) the Bar's right to uniform operation of laws as provided in the Iowa Constitution; (4) its substantive due process rights pursuant to the United States and Iowa Constitutions; (5) its procedural due process rights of the United States and Iowa Constitutions; (6) the commerce clause of the United States Constitution.

The Agency resists all these claims. The Agency requests that the Court affirm the Agency's final action.

STANDARD OF REVIEW

The district court acts in an appellate capacity in judicial review proceedings. *Mycogen Seeds v. Sands,* 686 NW2d 457, 463 (Iowa 2004). Iowa Code Section 17A.19(10) sets forth in subparagraphs "a" through "n" the circumstances under which the court has the authority to reverse, modify, or grant other appropriate relief from agency action. As indicated above, the first argument of the Bar is that the Agency's action is "beyond the authority delegated to the agency by any provision of law or in violation of any provision of law." Iowa Code Section 17A.19(10)(b). This relates to the Bar's claim that the Agency is without the authority to determine whether ISFAA has been violated and that any alleged violation of that act must be presented to and ruled upon by a judicial magistrate. Secondly, the Bar's claim that the ISFAA is unconstitutional would be based upon a claimed violation of Iowa Code Section 17A.19(10)(a) which provides that the district court may revise agency action that is "unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied."

It is not this Court's job to substitute its fact finding determination for that of the Agency, as long as there is substantial evidence in the record before the Court, when the record is viewed as a whole, supporting the Agency's finding of fact. Iowa Code Section 17A.19(10)(f). In this case, it does not appear that the parties have many, if any, factual disputes. The parties advised the Court at the hearing that they do not

specifically dispute any of the facts found by the Agency. As a result, this Court will be bound by the findings of fact of the Agency.

CONCLUSIONS OF LAW

The Court will address the Bar's arguments in turn.

I) Agency Authority to Enforce the ISFAA

The Bar's first argument is that the Agency does not have authority to 'punish' the Bar for violating the ISFAA or otherwise enforce the ISFAA because the bar has never been cited by a judicial magistrate for violating the ISFAA. According to Iowa Code § 142D.3(a) and (b), "Smoking is prohibited and a person shall not smoke in any of the following: Public places and [a]ll enclosed areas within places of employment…" Iowa Code § 142D.9 describes a series of ascending monetary penalties imposed upon a business owner or manager who fails to comply with ISFAA. According to Iowa Code § 142D.8(1), "[j]udicial magistrates shall hear and determine violations of this chapter." Essentially, the Bar argues that the Agency does not have jurisdiction to sanction the Bar for a violation of ISFAA because, according to its terms, the only remedy for a violation of ISFAA is a fine imposed by a judicial magistrate. Thus, because there has been no finding by a judicial magistrate that the Bar has violated the ISFAA, the Bar argues that the Agency cannot find that the Bar has violated the ISFAA. This argument clearly fails.

The first step in this analysis is to understand exactly what action is before the Court. Enforcement of ISFAA is not before the Court. Instead, enforcement of the Iowa Alcoholic Beverage Control Act is before the Court. The Agency was tasked with determining whether the Bar had violated the terms and conditions of its liquor license.

The Agency was not tasked with enforcing the provisions of ISFAA. This is not an appeal or challenge to an action enforcing the penalties provided for in ISFAA. Instead, this is a judicial review of agency action against a liquor license holder. The Agency is vested by statute with broad authority to administer and enforce the state's laws concerning alcohol. Iowa Code Sections 123.4, 123.20, 546.9. *City of Sioux City v. GME, Ltd.,* 584 NW2d 322, 325 (Iowa 1998). There is no question that if a liquor license holder breaks the law, the Agency has the authority to sanction that liquor license. Iowa Code Sections 123.39(1)(b)(2) and 123.30(2).

The Bar freely admits that it violated the provisions of the ISFAA. Such a violation justifies the Agency taking action against the Bar's liquor license. As a result, under the facts of this case the sole basis which would negate the Agency's action is if the law violated by the Bar is found to be unconstitutional. This Court completely rejects the Bar's argument that in order for the ISFAA to be grounds for sanctioning its liquor license, the civil penalty schedule provided for in Iowa Code Chapter 142D had to first be pursued. Those penalties are only applicable if an independent civil action was pursued against either the Bar or its employees or patrons. This is an action against its liquor license. The Agency was well within its authority to sanction the liquor license once this complaint was filed by the DPS.

II) Constitutional Claims

Administrative agencies are not authorized to decide constitutional issues or claims. *Soo Line, Co. v. Iowa Dept. of Transp.*, 521 NW2d 685, 688 (Iowa 1994). Regardless of this constitutional issues must be raised at the agency level to be preserved for judicial review. *Id.* The Bar properly preserved its constitutional clains

before the Agency in this case. Because the Agency is not allowed to rule upon the constitutional questions, these matters are of first impression for this Court in this particular case.

A) Privileges and Immunities and Right to Uniform Operation of Laws

The Bar's remaining arguments deal with the constitutionality of the smoking ban. The first such argument the Court will discuss, albeit briefly, is the Bar's contention that ISFAA violates the Privileges and Immunities Clause of the Federal Constitution. According to Article IV, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. In its Brief, the Bar recites a detailed history of privileges and immunities in the United States, citing references as remote as the Articles of Confederation. The Bar correctly notes that Article IV had not been held to confer any specific rights, and stands for the general proposition that no state shall deny a citizen of another state fair treatment or fundamental rights[1]. See generally *Slaughter-House Cases*, 83 U.S. 36, 1872 WL 15386 (1872).

Additionally, under the Fourteenth Amendment, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1, cl. 2. The Fourteenth Amendment's Privileges and Immunities Clause has had a more complicated history, with various interpretations over the years. In its brief the Bar seems to admit, and the Court agrees that modern cases have "used the more restrictive interpretation of the Fourteenth Amendment privileges

[1] In recent years Courts have ruled that the Article II privileges and immunities clause prohibits certain restrictions on the practice of law. See generally *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985) and *Barnard v. Thorstenn*, 489 U.S. 546, 109 S. Ct. 1294, 103 L. Ed. 2d 559 (1989). However, that rationale is inapplicable to the present case.

and immunities clause." (citing *Madden v. Kentucky*, 309 U.S. 83 (1940)) As such, there is no authority either textually in the Fourteenth Amendment or in the modern case law interpretation under which the Court could find the ISFAA denied the Bar a privilege or immunity guaranteed by the United States Constitution.[2]

The Bar argues that denying its right to pursue its business of selling liquor while allowing its patrons to smoke is denying it a privilege and immunity that other businesses enjoy. The sale of liquor is one of the most highly regulated businesses in the state. By agreeing to have a liquor license, the Bar is already subjected to rules that other businesses are free from, such as hours of sale, restrictions on who may be sold the product, and restrictions on what wholesaler the business may obtain its product from. There is no question that the liquor business is one that the legislature has determined that it is appropriate and necessary to deny certain privileges granted to other businesses. These conclusions are applicable to the claims presented by the Bar that the ISFAA violates its right to both the uniform operation of law and its privileges and immunity claim.

B) Due Process

Both the United States and Iowa Constitution prohibit states from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Iowa Const. art. I, § 9. "[Due process is] understood to include two separate but related concepts." *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). Substantive due process "prevents the government from interfering with rights implicit in the concept of

[2] Furthermore, to the extent any privileges and immunities argument would be applicable to the present case, it is duplicative of the due process and equal protection arguments addressed below. See *In re Chicago, Milwaukee, St. Pual & Pacific R.R. Co.*, 334 N.W.2d 290, 294 (Iowa 1983) stating that, "[w]hen a classification survives an equal protection challenge…it will also survive a privileges and immunities challenge under the same provision."

ordered liberty." *Id*. "Its companion concept, procedural due process, acts as a constraint on government action that infringes upon an individual's liberty interest." *Id*.

The Bar argues that it has been denied substantive and procedural due process under both the Iowa and Federal Constitutions. The due process provisions of the Iowa and Federal Constitution "are nearly identical in scope, import and purpose." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002); accord *In re Detention of Cubbage*, 671 N.W.2d 442, 446 (Iowa 2003). Accordingly, courts typically interpret both in a similar fashion. See *Hernandez-Lopez*, 639 N.W.2d at 237; *Cubbage*, 671 N.W.2d at 446. In the absence of an argument that analysis under each should differ, the Courts are to construe them similarly. See *In re Detention of Garren*, 620 N.W.2d 275, 280 (Iowa 2000); see also *Cubbage,* 671 N.W.2d at 446; *Hernandez-Lopez*, 639 N.W.2d at 237.

1) Substantive Due Process

"Substantive due process prevents the government from interfering with 'rights' implicit in the concept of ordered liberty." *Seering*, 701 N.W.2d at 663. (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). In a substantive due process examination, the Court first determines the "nature of the individual right involved." *Seering*, 701 N.W.2d at 663. If a fundamental right is involved, strict scrutiny analysis is applied. *Id*. If a fundamental right is not involved Courts only apply a rational basis analysis. *Id*.

The Supreme Court has not created a clear test for determining whether an alleged right that is not specifically and constitutionally enumerated is a fundamental right. *Cubbage*, 671 N.W.2d at 447. However, "[o]nly fundamental rights and liberties which are deeply rooted in this nation's history and tradition and implicit in the concept

of ordered liberty qualify for such protection." *Chavez v. Martinez,* 538 U.S. 760, 775 (2003) (citations omitted).

As noted in the State's brief, "[t]he substantive due process doctrine does not protect individuals from all governmental actions that infringe liberty or injure property…rather, substantive due process is reserved for the most egregious governmental abuses…" *Sate ex rel. Miller v. Smokers Warehouse Corp.*, 737 N.W.2d. 107, 111 (Iowa 2007) (citations omitted). Additionally, "[g]overnmental action violates principals of substantive due process when it shocks the conscience or impinges upon rights implicit in the concept of ordered liberty." *In re Detention of Hennings*, 744 N.W.2d 333, 337 (Iowa 2008) (citations omitted). The Bar argues that it "has a fundamental right to pursue a useful and lawful business without the imposition of oppressive burdens by the lawmaking powers." However, the Bar dramatically mischaracterizes the right involved in the present case. The issue is not whether the Bar has a right to pursue its lawful business. The issue instead is if the Bar has a fundamental right to allow patrons to smoke tobacco. It is clear that no such right exists.

The regulation of smoking has long historical roots in America. Over a hundred fifty years before the Constitution was ratified, the colony of Massachusetts banned public smoking in 1632.[3] While instances of smoking regulation such as the Massachusetts public smoking ban occurred earlier, it was not until the late nineteenth century that antismoking legislations became widespread.[4] These early smoking bans

[3] Randy Samson, *Atlantic City Special: Whether the Casino Exception to the New Jersey Smoke-Free Air Act Comports with the New Jersey Constitution's General Prohibition of Special Laws*, Comment, 38 Seton Hall L. Rev. 359, 362 (2008) (Citing Gene Borio, *Tobacco Timeline: The Seventeenth Century--The Great Age of the Pipe*, http://www.tobacco.org/resources/history/Tobacco_History17.html (last visited Oct. 2, 2007).).

[4] Ronald J. Rychlak, *Cards and Dice in Smoky Rooms: Tobacco Bans and Modern Casinos*, 57 Drake L. Rev. 467, 471-45 (2009) (Citing Joseph L. Bast, Please Don't Poop in My Salad and Other Essays Against the War on Smoking 11 (2006).).

addressed several different concerns. Pragmatically, in a time when most buildings were made of highly combustible materials and municipal fire codes were rare, there was a desire to reduce the instance of fires caused by stray tobacco ash.[5] Additionally, on top of the early health concerns that will be addressed below, there were concerns regarding the morality of tobacco use. In fact, like alcohol, smoking was considered by many to be "nasty" immoral habit.[6] Another transaction highly regulated by early Americans was the sale of tobacco products to minors.[7]

By the turn of the 20th Century, a number of states had laws banning tobacco use completely.[8] These laws included harsh penalties and at least one was upheld as valid exercise of the State's police power by the United States Supreme Court. See *Austin v. State of Tennessee*, 179 U.S. 343, 348-49 (1900) stating that, "[c]igarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco … [w]ithout undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely…"

As such, smoking tobacco in public places is neither deeply rooted in this nation's history and tradition nor is it implicit in the concept of American liberty. As cited in the State's brief, numerous Courts have reached the same conclusion. See *Castaways Blackwater Café, Inc. v. Marstiller*, Not Reported in F.Supp.2d, 2006 WL 2474034 at 4 (M.D. Fla. 2006) stating that:

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[5] Id. (Citing Peter D. Jacobson et al., Historical *Overview of Tobacco Legislation and Regulation, in Smoking: Who Has the Right?* 42, 44 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998).)
[6] *Id*.
[7] *Id*.
[8] Rychlak, supra note 3, at 474.

> The next question is whether the asserted right to allow patrons to smoke in a public restaurant is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Doe v. Moore*, 410 F.3d 1337, 1344 (11th Cir. 2005) (citation omitted). The answer clearly is no. *E.g., City of N. Miami v. Kurtz*, 653 So.2d 1025, 1028 (Fla.1995). While tobacco smoking may have a long history, both liberty and justice will continue to exist if smoking in a public restaurant is curtailed or precluded.

See, e.g., *American Legion Post # 149 v. Washington State Department of Health*, 192 P.3d 306, 322 (Wash. 2008) (Finding that no privacy right is infringed by a ban on smoking in private facilities because smoking is not a fundamental right.); *NYC C.L.A.S.H. Inc. v. City of New York*, 315 F. Supp. 2d 461, 481-86 (S.D.N.Y. 2004) (Finding that smokers are not a quasi-suspect class.); *Players, Inc. V. City of New York*, 371 F. Supp. 2d 522, 542 (S.D.N.Y. 2005) (Seemingly finding that there is no fundamental right to smoke.); *Coalition for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1252, 1263 (D.Colo. 2006), aff'd, 517 F.3d 1195 (10th Cir. 2008) (Finding that bar owners do not have a fundamental right to allow smoking in their establishments.); *Batte-Holmgren v. Commissioner of Pub. Health*, 914 A.2d 996 (Conn. 2007) (Finding that a ban on smoking in public places such as restaurants does not implicate a fundamental right.).

Because the ISFAA does not infringe a fundamental right, the Court applies a rational basis analysis. The rational basis standard requires a consideration of whether there is "a reasonable fit between the government interest and the means utilized to advance that interest." *Hernandez-Lopez*, 639 N.W.2d at 238. Additionally, under the rational basis test a law is presumed valid unless the relationship between it and the purpose behind it are so weak that the classification must be viewed as arbitrary or capricious. *State v. Willard*, 756 N.W.2d 207, 213 (2008). Consequently, the Court must

make a determination regarding the purpose of the ISFAA. In the present case, such a determination is not difficult. The Court agrees with the State that the General Assembly's goal in passing the ISFAA is improving public health. As stated in the ISFAA itself, "[t]he general assembly finds that environmental tobacco smoke causes and exacerbates disease in nonsmoking adults and children. These findings are sufficient to warrant measures that regulate smoking in public places, places of employment, and outdoor areas in order to protect the public health and the health of employees…The purpose of this chapter is to reduce the level of exposure by the general public and employees to environmental tobacco smoke in order to improve the public health of Iowans." Iowa Code § 142D.1(2)-(3),

The, final question is whether the law in question is rationally related to the stated purpose. There simply is no question that a public smoking ban is rationally related to reducing the public's exposure to environmental smoke. The idea that smoking is dangerous is not new nor are governmental attempts to protect its citizens from those dangers. In 1604 King James of England famously wrote that smoking was "[a] custom [loathsome] to the eye, hateful to the Nose, [harmful] to the brain[], dangerous to the Lungs, and in the black, stinking fume thereof [nearest] resembling the horrible Stigian smoke of the pit that is bottomless."[9] The Court need not trace the numerous, and indisputable, sources that have, from 1604 on, identified the significant public health risks associated with second hand tobacco smoke. Suffice to say that the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Surgeon General have all identified the dangers of secondhand smoke, with the

[9] Rychlak, 57 Drake L. Rev. at 471 (Citing James I of England, *A Counterblaste to Tobacco*, in 5 English Reprints 112 (Edward Arber ed., AMS Press 1966) (1604).).

Surgeon General going so far as to say that, "there is no risk-free level of exposure to secondhand smoke."[10] The Court notes that recent studies have even suggested that there are real dangers associated with the tobacco smoke residue that is left on clothes and other surfaces long after the actual smoking has ceased, which is becoming known as 'third-hand smoke.'[11] The Bar's contention that "[t]he legislatively relied upon 'science' is more in the realm of antidotal information…" would be laughable, if the dangers of second-hand smoke were not so grave.

When the stated governmental goal is to reduce the public's exposure to second-hand smoke, there can be no question that a ban on public smoking is rationally related to that goal. Moreover, the Court notes that the long line of cases cited above in support of the proposition there is no fundamental right to smoking in public also stands for proposition that a ban on public smoking is rationally related to the governmental goal of protecting the public from second-hand smoke. Accordingly, the ISFAA does not violate the Bar's right to sustentative due process.

2) Procedural Due Process

"Procedural due process protections act as a constraint on government action that infringes upon an individual's liberty interest." *Hernandez-Lopez*, 639 N.W.2d at 240. In determining whether a statute violates an individual's right to procedural due process, "[w]e consider the type of process due and determine whether the procedures provided in the statute adequately comply with the process requirements." *Id*. Accordingly, the first step in any procedural due process inquiry is the determination of

[10] Kevin D. Sherlock, *Clearing the Air: Analyzing the Constitutionality of the Iowa Smokefree Air Act's Gaming-Floor Exemption*, 95 Iowa L. Rev. 347, 352-53 (2009).
[11] See BBC News, *Third-hand Smoke Risk Warning*, http://news.bbc.co.uk/go/pr/fr/-/2/hi/health/8503870.stm (last vistited 02/24/2010).

"whether a protected liberty or property interest is involved." *Bowers*, 638 N.W.2d at 691. Such liberty interests have their source in the Federal Constitution and "include such things as freedom from bodily restraint, the right to contract, the right to marry and raise children, and the right to worship according to the dictates of a person's conscience." *Id*. Protected property interests "'are created and their dimensions are defined' not by the Constitution but by an independent source such as state law." *Id*.

Upon determining that a protected interest is involved, we undertake an analysis that balances three factors to determine what process is due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail.

Seering, 701 N.W.2d at 665-666 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); accord *Hernandez-Lopez*, 639 N.W.2d at 240. At the very least, procedural due process requires "notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'" *Bowers*, 638 N.W.2d at 691 (citation omitted); accord *Hernandez-Lopez*, 639 N.W.2d at 241. As the Bar admits in their brief, Iowa has generally followed federal due process analysis.

Accordingly, the Court must first determine if a protected property interest is at issue in the present case. As far as the Court can determine, the Bar's essential procedural due process argument is that they have a protected property interest in their business, and this interest has been infringed by the ISFAA. To wit, among other claims, the Bar states that its right to carry on business with 20% of the adult Iowa

population has been deprived without due process. Again, in what can only be an attempt to distract the Court, the Bar begins its written argument with a lengthy recitation of ancient precedent, this time citing not the Articles of Confederation, but the Magna Carte. Regardless of that history, the Bar fails to properly characterize the issues at play in this case.

The sanction at issue is the revocation of the Bar's liquor license. Consequently, the "property" at issue is that license. As the State correctly argues, the "control of alcoholic beverages, including the manner and circumstances under which they may be dispense, if at all, has been within the police power of the States." *Three K.C. v. Richter*, 279 N.W.2d 2687, 271 (Iowa 1979). Iowa Code Section 123.38 specifically states that, "[a] special liquor permit, liquor control license, wine permit, or beer permit is a personal privilege and is revocable for cause. It is not property…" (Emphasis added).

Furthermore, and regardless of the fact that the liquor license is not property, the Bar has had both notice and opportunity for hearing. (As this very Agency Appeal is a testament too.) Without going into a lengthy recitation of the procedural history of this action, it is clear that the Bar has had no less than three hearings, notice of each of those hearings, representation at those hearings, an opportunity to present evidence at those hearings, and an opportunity to challenge the validity and constitutionality of the statutes at issue. Clearly, the due process requirements have been met regarding the revocation of the bar's liquor license. Moreover, "'[n]o particular procedure violates [due process] merely because another method may seem fairer or wiser.'" *Bowers*, 638 N.W.2d at 691 (citation omitted). Consequently, the fact that the Bar may have desired

different procedures is irrelevant to question of whether the present procedures comported with due process.

The Bar has attempted to frame the present due process argument in a different manner, stating that the ISFAA has deprived the Bar of some protected property right by prohibiting smoking at the Bar. Clearly, there is no precedent to support such an argument. As was addressed above, and will be touched on again below, there is no fundamental or protected right to smoke in public or allow patrons to smoke in a public business. The Bar was not deprived of any property when smoking was banned, it was not denied the right to carry on its business, nor was it denied any specific group of customers.

Finally, under the heading of procedural due process, the Bar renews its argument that the present action is improper because the Bar was never cited before a judicial magistrate for its violation of the ISFAA. For the reasons cited in section I above, that argument fails.

C) Commerce Clause

The Bar's next argument concerns the dormant Commerce Clause of the United States Constitution. The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power ... [t]o regulate Commerce ... among the several States." Art I, § 8, cl. 3. However, the Commerce Clause is more than an affirmative grant of power; it also prohibits certain state actions that unjustifiably discriminate against or burden the interstate flow of commerce. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Oregon*, 511 U.S. 93, 98 (1994) (citations omitted). The Supreme Court of the United States has found that the Framers

granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relationships among the colonies and later among the States under the Articles of Confederation." *Id*. (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325-326, (1979)). Thus, the purpose of the dormant Commerce Clause is to protect against inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another state. *Healy v. The Beer Institute*, 491 U.S. 324, 336-337 (1989). Further, the dormant Commerce Clause is intended "to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *S.D. Myers Inc., v. City and County of San Francisco*, 253 F.3d 461, (9th Cir.2001) (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)).

ISFAA does not regulate or restrict the sale of tobacco in Iowa. Nor does the statute have the effect of favoring in-state economic interests over out-of-state economic interests. As a result, the Court is unable to see any way in which this law can be construed as violating the Commerce Clause. But even assuming for the purposes of argument that some of the Bar's claims are valid, the following analysis demonstrates how those claims fail.

The Supreme Court has outlined a two tiered approach to analyzing state regulations under the dormant Commerce Clause. First, if a statute directly regulates interstate commerce, discriminates against interstate commerce, or favors in-state over out-of-state interests, the statute is "virtually per se invalid." *Brown-Forman Distillers*

Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986); *Hughes*, 441 U.S. at 344, n. 6. Statutes in this category are strictly scrutinized and "the burden falls on the State to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 353 (1977). "Direct regulation occurs when a state law directly affects transactions that take place across state lines or entirely outside the state's borders." *S.D. Myers Inc., v. City and County of San Francisco*, 253 F.3d 461, (9th Cir.2001). The practical effect of a challenged statute is the critical inquiry when determining whether that statute constitutes direct regulation. *Id*. (citation ommitted). In analyzing the practical effect of the statute, the court must consider the consequences of the statute itself and how the statute may interact with legitimate regulatory regimes of other states. *Id*.

However, if the regulation is non-discriminatory and has only incidental or indirect effects on interstate commerce, it must be analyzed under the second tier of the dormant Commerce Clause test. These regulations are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see also *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir.1991) ("For a facially neutral statute to violate the Commerce Clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational."). "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate

activities." *Id*. at 143. However, the burdens on interstate commerce will outweigh the benefits if the "asserted benefits are in fact illusory." *Alaska Airlines*, 951 F.2d at 983.

This balancing test under the second tier analysis does not, however, invite courts to "'second guess the empirical judgments of lawmakers concerning the utility of the legislation.'" *CTS Corp. v. Dynamics Corp. Of Am.*, 481 U.S. 69, 92 (1987) (quoting *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 669 (1981)). Additionally, it is not the function of the court to decide whether in fact the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmakers indicated that the regulation is not wholly irrational in light of its purposes. *Kassel*, 450 U.S. at 680-1.

The Bar begins its argument with an interesting, if irrelevant historical reference, in this case citing the fact that the Revolutionary War was financed in part by the sale of tobacco. Getting beyond history, the Bar's essential argument is that ISFAA places an unconstitutional burden on interstate commerce. The Bar alleges that tobacco is a legal item of interstate commerce heavily regulated by the Federal government, and is of immense tax value to all states. All of these statements are undoubtedly true. However, the Bar fails to identify a way in which the ISFAA discriminates or discourages interstate commerce in favor of intrastate commerce.

The Bar mischaracterizes the intent and effect of the ISFAA in an attempt to construe it as unconstitutional. In its brief, the Bar states that, "the statute was intended to stop adults from consuming tobacco products." The Bar argues that because the ISFAA stops smoking it has a negative effect on interstate commerce. As discussed above, this is simply not true. The legislative intent of the ISFAA was to protect the

public from second-hand smoke. The act was not intended to stop individuals from smoking, but was meant to regulate where smoking is appropriate to ensure the safety of the public.

Regardless, there is no evidence that ISFAA is a facially discriminatory statute. The ISFAA's connection to interstate commerce is tenuous at best. It certainly does not directly regulate interstate commerce.[12] Nor does it favor in state commerce over out of state commerce. The ISFAA's direct effect is limited to public places within the State of Iowa; it contains no regulatory mechanism that occurs outside of Iowa. The Bar has failed to cite, and the Court has failed to find any evidence that the ISFAA will have any impact on the legitimate regulatory regimes of other states.

As such, the Court finds that ISFAA has only an incidental or indirect effect on interstate commerce. Consequently, the ISFAA is constitutional under the second tier of the Dormant Commerce Clause so long as it relates to a legitimate local interest and the burden imposed on interstate commerce is not excessive in relation to the putative local benefits. As discussed above, the ISFAA clearly relates to a legitimate state interest in protecting its citizens from the dangers of second-hand smoke and there is no (actual) evidence that the ISFAA has any negative impact on interstate commerce. Moreover, even assuming that the ISFAA had some quantifiable, discriminatory, impact on interstate commerce, such an impact would have to be considerable to out weight the substantial interest Iowa has in protecting its citizens from the numerous fatal diseases caused by second-hand smoke.

[12] That is to say, the ISFAA does not prohibit or discourage an out of state service or product, or otherwise favor an instate instrument of commerce over an out of state instrument of commerce.

D) Equal Protection

The Court now turns to the Bar's final, and most compelling, argument, that the ISFAA violates the constitutional guarantee of equal protection of the laws. [13] As stated in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009):

> The foundational principle of equal protection is expressed in Article I, Section 6 of the Iowa Constitution, which provides: 'All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.'… Like the Federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution, Iowa's constitutional promise of equal protection " 'is essentially a direction that all persons similarly situated should be treated alike.' " *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) [hereinafter RACI II] (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

1) Federal Equal Protection

The federal Equal Protection Clause prohibits states from "deny[ing] ... any person within its jurisdiction from equal protection of the laws." U.S. Const. amend XIV, § 1. The amount of deference given to the legislative policy making is based upon the level of scrutiny applied to review legislative action. *Varnum*, at 879. Three levels of scrutiny are established; strict scrutiny, an intermediate tier, and rational basis.

If the statute in question targets a suspect class of individuals, the court should apply a strict scrutiny analysis. Under this approach, classifications based upon race, alienation, or national origin and those effecting fundamental rights are evaluated under the strict scrutiny analysis. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998). Classifications subject to strict scrutiny are presumptively invalid and must be narrowly

[13] See Associated Press, *Bar Owners Fail to Stop Ban*, CLINTON-HERALD (Clinton, Iowa), Aug. 5, 2008 (Describing how, in a ruling on a motion for a temporary injunction of the ISFAA based on constitutional grounds, a Polk County District Court Judge ruled that the only viable challenge to the ISFAA was on equal protection grounds.)

tailored to serve a compelling governmental interest. *In Re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004).

The intermediate tier has been applied to statutes classifying on the basis of gender or illegitimacy and requires the party seeking to uphold the statute to demonstrate the challenged classification is substantially related to the achievement of an important governmental objective. *Sherman*, at 317. This is known as the intermediate scrutiny or heightened scrutiny analysis. To survive intermediate scrutiny, the law must not only further an important governmental interest and be substantially related to that interest, but the justification for the classification must be genuine and must not depend upon broad generalizations. *United States v. Virginia*, 518 U.S., 515, 533 (1996).

Most cases involve a very deferential standard known as the rational basis test. *Varnum*, at 879. Under the rational basis test, "[t]he plaintiff has the heavy burden of showing the statute unconstitutional and must negate every reasonable basis upon which the classification may be sustained." *Varnum*, at 879. A statute will satisfy the requirements of the equal protection clause under this analysis:

> "[s]o long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."

Varnum, at 879 (including cites to *Fitzgerald v. Racing Assn of Cent. Iowa*, 539 U.S., 103, 107 (2003)).

Quite simply, there is no credible argument that the ISFAA targets a suspect class. Additionally, Courts have held that smokers (and thus presumably bars

frequented by smokers) are neither a suspect class nor a quasi-suspect class. See *NYC C.L.A.S.H. Inc.*, 315 F. Supp. 2d at 481-86 (S.D.N.Y. 2004) (Finding that smokers are not a quasi-suspect class.) As a result the court will apply the very deferential standard known as the "rational basis test."

The Bar has made several different claims on equal protection grounds, but, essentially, the Bar argues that it has been denied equal protection of the law because smoking has been banned in the Bar while smoking is allowed at those places exempted by from the ISFAA such as casinos.

The Court begins its analysis by recognizing the constitutional pledge of equal protection does not prohibit laws that impose classifications. *Chicago & Nw. Ry. v. Fachman*, 125 N.W.2d 210, 214 (1963) (recognizing "it is often necessary in accomplishing efficient and beneficial legislation to divide the subjects upon which it operates into classes"). Many statutes impose classifications by granting special benefits or declaring special burdens, and the equal protection clause does not require all laws to apply uniformly to all people. *Nordlinger v. Hahn*, 505 U.S. 1, 10, (1992). Instead, equal protection demands that laws treat alike all people who are "'similarly situated with respect to the legitimate purposes of the law.'" *RACI II*, 675 N.W.2d at 7 (quoting *Coll. Area Renters & Landlord Ass'n v. City of San Diego*, 43 Cal.App.4th 677, 50 Cal.Rptr.2d 515, 520 (1996)). Thus, whether the Bar is similarly situated with those organizations exempted from the ISFAA is the threshold question. Under this threshold test, if the Bar cannot show as a preliminary matter that they are similarly situated, the Court need not further consider whether their different treatment is permitted under the

equal protection clause. *Varnum*, 763 N.W.2d at 882 *citing Timberland Partners XXI, LLP v. Iowa Dep't of Revenue*, 757 N.W.2d 172, 176-77 (Iowa 2008).

The Bar is not similarly situated to those types of institutions and businesses that are exempted from the ISFAA. Institutions or places receiving special consideration in the ISFAA are fairgrounds, National Guard facilities, correctional facilities, hotel rooms, private clubs, the Iowa Veteran's Home, limousines, retail tobacco shops and casinos. The Court notes as persuasive the Agency's argument that if generic similarities "were sufficient to meet the similarly situated prong of the equal protection test, no two business engaged in the sale of goods or services to the public could ever be regulated differently from one another by the State of Iowa." There are clear distinctions between those places given special consideration by the ISFAA. A fair ground is different from a veteran's home, which is different from a limousine, which is also different from a casino and a National Guard garrison.

Several of the distinctions are for places where private individuals reside, such as the Veteran's Home, correctional facilities and hotels. Private clubs are not open to the public, nor are privately rented limousines. Fair grounds are generally open air venues which result in a significantly decreased risk of second-hand smoke. The closest question is that of casinos as casinos do have several superficial similarities to bars and restaurants. Only casinos are licensed to allow gambling in the State of Iowa. Additionally, the tax and regulatory structures for casinos are radically different than the tax and regulatory schemes affecting bars and restaurants. Because the Bar is not similarly situated with those places that receive separate or individualized treatment under ISFAA, the Bar's Federal Equal Protection challenge to the ISFAA fails.

However, even assuming arguendo that the Bar was similarly situated to those business and organizations exempted from the ISFAA, there is still a rational basis for the distinctions. As noted above, there are reasonable and rational reasons for the distinctions between several of the places singled out by the ISFAA. Under the deferential rational basis standard, the law is valid unless the relationship between the classification and the purpose behind it is so weak the classification must be viewed as arbitrary or capricious. *Willard*, 756 N.W.2d at 213. Moreover Courts applying similar distinctions in public smoking bans have stated that, "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made mathematical nicety or because in practice it results in some inequity.'" *Coalition for Equal Rights, Inc.*, 458 F. Supp. 2d at 1260 (citations omitted).

Hotel Rooms, The Veteran's Home, Correctional Facilities,

and National Guard Facilities

There is a clear, reasonable basis for the distinction of these types of places. These four places are essentially individual residences. They are not open to the public in such a way that non-smokers would be seated adjacent to smokers in close quarters. Nor is it likely that employees at these places would be forced to spend their entire shift in the presence of smokers. Instead, private individuals, alone in their quarters are allowed to smoke. This is a distinct and rational difference from how smoke affects both the public and employees at bars or restaurants. Specifically, in these private residence type situations, the primary danger from smoking is only to the smoker. There is greatly

reduced chance that an unwitting bystander will be subjected to the dangers of second-hand smoke.

Limousines and Private Clubs

Similarly, limousines and private clubs are not open to the public. Only those freely choosing to smoke at the club or in the limousine are subject to the danger of smoking. Consequently, there is reasonable basis for this distinction.

Retail Smoking Outlets

The logic of exempting retail smoking outlets is self evident, in that there is an assumption that only smokers frequent such establishments. Thus, the danger of the smoke is limited to those already choosing to smoke.

Fairgrounds and Open Air Venues

The dangers of second-smoke are greatly reduced by being outside as tobacco smoke disperses very quickly in the 'fresh' air. Thus, there is a rational reason to exempt open air venues such fairgrounds from the smoking ban.

Casinos

Lastly, the Legislature has a reasonable basis for exempting casino gambling areas from the general provisions of the ISFAA. First, it is important to note that according to I.C.A. 142D.4 (10) only the actual gaming area of a casino is exempted. Smoking is prohibited in casino bars and restaurants. That said the State has a substantial economic incentive in allowing smoking in the gaming area of the casinos. Without reciting all examples cited by the State in its brief, it is clear that a large amount of money 'spent' at casinos goes directly to the State of Iowa and its political

subdivisions. This money is spent in a variety of ways that directly benefit the citizens of Iowa.

Also persuasive to the Court, is the fact that a number of other Courts have already recognized that smoking ban exemptions for casinos based upon economic considerations are reasonable. In *Amiriantz v. New Jersey*, Not Reported in F.Supp.2d, 2006 WL 3486814 at 6 (D.N.J. 2006), the Court stated that when "challenging state legislation under the equal protection clause [the challenger] must show that the requirements imposed by law or regulation 'so lack rationality that they constitute a constitutionally impermissible denial of equal protection….Plaintiff is unable to overcome that burden here. Indeed, Plaintiff acknowledges that at least one purpose of the casino exemption is 'to protect and/or foster the casino's and State's economy.' … The Court finds that economic considerations provide a rational basis for the casino exemption."

Two other courts have also upheld the constitutionality of state smoking ban legislation which provided special exemptions for casinos. See *Batte-Holmgren*, 2004 WL 2896485 (Conn.), which found that the legislature's concern regarding its inability to enforce the smoking ban at casinos provided a rational basis for their exemption and *Coalition for Equal Rights, Inc. v. Owens, 458* F. Supp. 1251 (D. Colo. 2006), which held that economic considerations constituted a proper basis for a smoking ban exemption for casinos.

It is important to note that federal equal protection jurisprudence does not require a State legislature to have a 'good' or just reason for imposing a distinction under the rational basis test. The distinction need only have a reasonable basis or a plausible

policy justification. It is clear that there is a reasonable basis for exempting casinos. Simply put, the State would lose too much money by banning smoking in casino gambling areas. Accordingly, because the State had a reasonable basis for exempting casino gaming areas from the ISFAA, that exemption does not violate the Federal Equal Protection Clause.

2) Equal Protection and Uniform Operation of Laws in Iowa

Traditionally, Iowa courts were said to "apply the same analysis in considering the state equal protection claims as ... in considering the federal equal protection claim." *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000) (quoting *State v. Ceaser*, 585 N.W.2d 192, 196 (Iowa 1998)). Recently, the Iowa Supreme Court has indicated that equal protection standards in Iowa, and under the Iowa State Constitution, are somewhat divergent from the equal protection test applied under United States Constitution. (See *State v. Bruegger,* 773 N.W.2d 862, 883 (Iowa 2009), stating that Iowa Courts "do not necessarily apply the federal [equal protection] standards in the same way as the United States Supreme Court.")

This change was the result of a series of cases that have been cited above. In *Racing Association of Central Iowa v. Fitzgerald*, 648 N.W.2d 555, 562 (Iowa 2002), the Iowa Supreme Courted ruled that a statutory scheme taxing slot machines at racetracks at a higher rate than similar machines on riverboats violated equal protection. The United States Supreme Court reversed, holding that the Federal Equal Protection Clause, as properly applied, did not invalidate the classification. *Fitzgerald,* 539 U.S. at 109-10. The Supreme Court stated that, "there is 'a plausible policy reason for the classification,' that the legislature 'rationally may have ... considered ... true' the related

justifying ‘legislative facts,’ and that the ‘relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.’” *Id*. at 110 (citations omitted).

On remand, the Iowa Supreme Court applied established federal equal protection principles in a different and more stringent fashion under our state constitution. *RACI II*, 675 N.W.2d at 6-7. The Court stated that the rational basis review of legislation was not a “toothless” exercise in Iowa, and then proceeded to come to a different result than that reached by the Supreme Court in the same case. *Id*. at 9.

Similarly, in *Varnum v. Brien* the Iowa Supreme Court concluded that the equal protection clause of the Iowa Constitution prohibited discrimination based upon sexual orientation in the issuing of the marriage licenses when no such right has been recognized under the Federal Constitution. That Court stated that:

> Although the rational basis test is ‘deferential to legislative judgment, ‘it is not a toothless one’ in Iowa.’ The rational basis test defers to the legislature's prerogative to make policy decisions by requiring only a plausible policy justification, mere rationality of the facts underlying the decision and, again, a merely rational relationship between the classification and the policy justification. Nonetheless, the deference built into the rational basis test is not dispositive because this court engages in a meaningful review of all legislation challenged on equal protection grounds by applying the rational basis test to the facts of each case.

Varnum, 763 N.W.2d at 879 (citations omitted). Thus, in two recent cases the Iowa Supreme Court has separated Iowa law from Federal law on the question of equal protection. As such, it is clear that the Iowa equal protection clause has more ‘teeth’ than its federal counterpart. The statute must serve a legitimate governmental purpose that is not specious, but is credible and realistically conceivable. 95 Iowa Law Review

347,377 citing RACI II, 675 N.W. 2d at 7. That said, even under the heightened standard guaranteed by the Iowa State Constitution, the ISFAA is still proper.

As noted above, there are rational distinctions between the classifications in the ISFAA. Without rehashing the arguments laid out above, the Court sees no reason why these distinctions would be improper under 'toothier' Iowa Equal Protection Clause. After engaging in a meaningful review of the distinctions contained in the ISFAA the Court finds that they are rationally related to a legitimate state interest as described above.

Moreover, assuming arguendo that the Court found that ISFAA was unconstitutional because it unfairly discriminated between the Bar and other similarly situated, yet exempted business such as casinos, the Bar would still lose is its liquor license. This is because, as the State argues in its brief, the remedy would be for the Court to strike the unconstitutional provision from the statute. Equal protection, at its core, requires that similar institutions (or individuals) are treated similarly. Thus, the remedy for an equal protection violation would to require similar treatment of the (allegedly) similar situated businesses. In this case, that would mean that if a finding was made that ISFAA's exemptions of certain public places, such as casinos, violated equal protection the remedy would be to strike the exemptions.[14] Consequently, smoking would still be banned in public places such as the Bar. The difference is that smoking would also be banned in the heretofore exempted areas. Thus the Bar would

[14] See I.C.A. § 4.12 stating that, "If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable."

still be subject to a license revocation/denial because of its failure to comply with the ISFAA.

Parenthetically the court observes that the Bar is not even the real party in interest in an equal protection challenge to the ISFAA. The Bar is not being denied any protection (or benefit) of the law. The law is designed to protect individuals from second hand smoke. When it finally comes into compliance with the ISFAA, the Bar will be protected from the dangers of secondhand smoke. The more appropriate party to challenge the ISFAA on equal protection grounds would be a party that is being denied the protection from second hand smoke that is offered to others by the ISFAA.

Based upon the foregoing, the Court finds that the Iowa Smokefree Air Act is constitutional under both the Federal and State Constitutions.

ORDER

For the reason set forth above, the Court affirms the decision of the Alcoholic Beverage Division Administrator. Costs are assessed to the petitioner.

IT IS SO ORDERED.

Dated this 31st day of March 2010.

_____
MARY ANN BROWN
JUDGE, EIGHTH JUDICIAL DISTRICT

CERTIFICATE OF SERVICE: The undersigned certifies that a true copy of this document was served on each person named (and checked) below, including attorneys of record, or the parties where no attorney is of record, by electronically mailing this document; enclosing this document in an envelope addressed to each named person at the respective addresses disclosed by the pleadings of record herein, with postage fully paid, by depositing the envelope in a United States depository; or by hand delivering this document. The date and manner of service may be verified with the Clerk of Court.

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